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An Evaluation of the Development of the Right of Access to Information under the New South African Constitutional Dispensation since 1994: a Study through Cases.

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Chapter 1: Introduction to the right of access to information

1.1 General introduction

The adoption of the Constitution of the Republic of South Africa, 1993 signified the demise of the apartheid legal order and the beginning of the transition to a constitutional democracy.¹ The Interim Constitution was regarded as a historic bridge between the old apartheid legal order and the new constitutional dispensation premised on the recognition of human rights and democracy.² On 27 April 1994, the Interim Constitution came into force and was entrenched as the supreme law of the country.³ Chapter 3 of the Interim Constitution entrenched a catalogue of fundamental rights which were accorded to all South Africans.⁴ Amongst these rights, was the right of access to information. The right of access to information guaranteed access to all information held by the State and its organs in so far as such information was required to exercise or protect any rights.⁵

In February 1997, the Constitution of the Republic of South Africa, 1996 superseded the Interim Constitution.⁶ Similar to the Interim Constitution, the Constitution entrenches a Bill of Rights which lists the right of access to information amongst the rights enshrined therein.⁷ The right of access to information is now entrenched in section 32 of the Constitution.⁸ It is the development of this constitutional right of access to information under the new South African constitutional dispensation that forms the basis of this thesis. The aim of this chapter therefore, is to provide a general introduction focusing on the development of the right of access to information under the new South African constitutional dispensation. The focus, methodology and the structure of this thesis are also contained in this chapter.

¹ Constitution of the Republic of South Africa Act 200 of 1993 (hereafter referred to as the Interim Constitution).

² See the epilogue of the Interim Constitution.

³ Section 4(1) of the Interim Constitution.

⁴ S5 (3) and chapter 3 of the Interim Constitution.

⁵ S23 of the Interim Constitution.

⁶ Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution).

⁷ See chapter 2 of the Constitution.

⁸ In terms of s32 of the Constitution, everyone has the right of access to: (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.

Firstly, it is important to recognise that under the new South African constitutional dispensation, the Bill of Rights entrenched in chapter 2 of the Constitution is a cornerstone of democracy.⁹ The State is therefore, required to respect, protect, promote and fulfil all the rights contained in the Bill of Rights.¹⁰ However, all the rights entrenched in the Bill of Rights, including the right of access to information are subject to limitations set out in section 36 of the Constitution, or elsewhere in the Bill.¹¹ Unlike the right of access to information set out in section 23 of the Interim Constitution, section 32 of the Constitution expands the right of access to information to include the right of access to any information held by the State and any information held by another person that is required for the exercising or protection of any rights.¹²

Moreover, section 32 (2) of the Constitution required a national law to be enacted to give effect to the right of access to information and to provide for reasonable measures to alleviate the administrative and financial burden on the State.¹³ The first democratically elected Parliament was afforded three years from the date on which the Constitution took effect to enact the national law that was required in terms of section 32 (2) of the Constitution.¹⁴ As a result, the Promotion of Access to Information Act (PAIA) was enacted.¹⁵ The PAIA was promulgated to, *inter alia*, give effect to the right of access to information held by the State and any information that is held by another person that is required for the protection of any rights.¹⁶ Furthermore, the PAIA was enacted to foster a culture of transparency and accountability in public and private bodies.¹⁷ In addition, the Constitutional Court in the case of *In Re: Certification of the Constitution of the Republic of South Africa*,¹⁸ stated that the right of access to information was entrenched to promote good government in the new South African legal dispensation.¹⁹

⁹ S7 (1) of the Constitution.

¹⁰ S7 (2) of the Constitution.

¹¹ S7 (3) of the Constitution.

¹² S32 (1) (a) and (b) of the Constitution.

¹³ S32 (2) of the Constitution.

¹⁴ S23 of schedule 6 of the Constitution (transitional arrangements).

¹⁵ Act 2 of 2000 (hereafter referred to as the PAIA).

¹⁶ See the Long title of the PAIA.

¹⁷ See the Preamble of the PAIA.

¹⁸ 1996 (10) BCLR 1253 (CC) (hereafter referred to as *First Certification Judgment*).

¹⁹ *First Certification Judgment*, para 85 at 1292.

Apart from entrenching the right of access to information, the Interim Constitution enjoined the judiciary to promote the values which underlined an open democratic society when interpreting the rights entrenched therein.²⁰ It was in this context that the Constitutional Court in the matter of *Shabalala v the Attorney-General of the Transvaal and Others*,²¹ stated that the Interim Constitution represented a shift from the apartheid legal order to a constitutionally entrenched culture of democracy and openness.²² The Court also stated that the new South African constitutional dispensation was to be premised on a legal culture of accountability and transparency.²³

After the repeal of the Interim Constitution, its successor the Constitution, articulates the goals of laying the foundations for an open democratic South Africa.²⁴ In addition, section 1(d) of the Constitution also entrenches the founding values of accountability, responsiveness and openness as values upon which the South African State is founded.²⁵ The Constitutional Court has confirmed in several judgments, including in the case of *United Democratic Movement v President of the Republic of South Africa*,²⁶ that the founding values entrenched in section 1 informs the interpretation of the Constitution and sets out positive standards with which all laws in South Africa have to comply to be valid.²⁷

Moreover, in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (Nicro) and Others*,²⁸ the Constitutional Court further confirmed that the rights entrenched in the Bill of Rights give effect to the founding values and they must be interpreted in a manner that is consistent with them.²⁹ The notion of accountability and openness are not only embodied in the founding provisions but are mentioned in numerous other provisions of the Constitution.³⁰ However, the Constitutional Court has stated that in as much as these founding values are of paramount importance, they do not give rise to directly enforceable

²⁰ S35 (1) of the Interim Constitution.

²¹ 1995 (12) BCLR 1593 (CC) (hereafter referred to as the *Shabalala* case).

²² *Shabalala* case, para 26 at 1605.

²³ *Shabalala* case, para 26 at 1605.

²⁴ See the Preamble of the Constitution.

²⁵ S1 (d) of the Constitution.

²⁶ 2002 (11) BCLR 1179 (CC) (hereafter referred to as the *UDM* case).

²⁷ *UDM* case, para 19 at 1187.

²⁸ 2005 (3) SA 280 (Hereafter referred to as the *NICRO* case).

²⁹ *Nicro* case, para 23 at 290.

³⁰ See s 36 (1), s 39(1) (a) and s 195 (1) (f) of the Constitution.

rights in themselves.³¹ It is therefore clear that the founding values set out in section 1 of the Constitution have to be adhered to when interpreting the rights entrenched in the Constitution. It is within this context that some legal commentators have pointed out that the right of access to information is one of the most effective ways of upholding the constitutional values of transparency, openness and accountability.³²

To this end, the link between the right of access to information and the founding values of accountability and openness can also be traced from the 34 Constitutional Principles that were included in the Interim Constitution.³³ These Principles were included to provide guidelines for the agreed basic structure and premises of the new constitutional text. Constitutional Principle IX was specifically included to ensure that provision was made in the new constitutional text for freedom of information in order to foster an open and accountable administration in South Africa.³⁴ It must therefore be emphasised that the right of access to information is entrenched to ensure that a legal culture of accountability, transparency and openness is realised in the new South African constitutional dispensation.

1.2 Research Focus

As indicated above, the right of access to information is one of the most important rights introduced under the new South African constitutional legal order to facilitate a legal culture of accountability, transparency and openness. Given the importance of this right, it is essential to evaluate its development and impact in facilitating an open democratic society premised on the values of accountability, responsiveness and openness in South Africa's new constitutional dispensation.

Since 1994, there have been numerous cases in different divisions of the South African courts, including the Constitutional Court, that have dealt with the right of access to information. The case law developed since 1994, provides a valuable aid through which the development of the right of access to information can be evaluated. Hence, the focus in this thesis will be on the evaluation of the judicial

³¹ *Nicro* case, para 21 at 290.

³² See C Hoexter, *Administrative Law in South Africa* 2nd ed (2013), at 94 (hereafter referred to as Hoexter (2013)).

³³ See schedule 4 of the Interim Constitution.

³⁴ See Principle IX in Schedule 4 of the Interim Constitution.

judgments of various South African courts, particularly the Constitutional Court as it relates to the right of access to information. In addition, this thesis will also evaluate the extent to which the development of this right has entrenched the foundational values of accountability, responsiveness and openness in the new South African dispensation.

1.3 Research Aims

On 27 April 2016, South Africa celebrated 22 years since the dawn of a new democracy. This monumental achievement in the history of South Africa presents an opportunity to explore the development of the right of access to information and its impact in establishing an open democracy in South Africa. Hence, this thesis aims to evaluate and examine the jurisprudence relating to the right of access to information and to highlight the importance and the purpose of this right in South Africa's new constitutional legal order. Furthermore, this thesis aims to establish the extent to which the South African courts have contributed towards establishing an open democratic society since 1994.

In *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services*,³⁵ Moseneke D.C.J. stated that the notion of openness in South Africa finds expression in the foundational values, which directs the establishment of a democratic Government premised on the constitutional supremacy and the rule of law to ensure that a legal culture of transparency, accountability and responsiveness is observed.³⁶ In the final analyses, this evaluation will seek to highlight the effects of the development of the right of access to information in entrenching a legal culture of accountability, responsiveness and openness in South Africa's new paradigm of constitutionalism.

1.4 Research Methodology

As outlined above, the focus of this thesis will largely be on the court cases that have dealt with the right of access to information in the new South African constitutional

³⁵ 2008 (8) BCLR 771 (CC) (Hereafter referred to as *Independent Newspaper case*).

³⁶ *Independent Newspaper*, para 40 at 787.

dispensation. Therefore, the case law decided under the Interim Constitution and its successor, the Constitution will be studied, analysed and evaluated in pursuit of the aims of this thesis. In addition, certain textbooks, statutes, articles and publications dealing with the right of access to information will also be considered to create a comprehensive picture of how this right has developed since 1994.

1.5 Literature Review

Prior to 1994, there was no general right of access to information in the South African legal framework.³⁷ As a result, public and private bodies operated in secrecy. This often led to the abuse of power and gross human rights violations in South Africa.³⁸ The Interim Constitution and later the Constitution, entrenched the right of access to information in order to create a democratic state premised on the principle of openness, transparency and accountability.³⁹ Cora Hoexter stated that the aim of entrenching the right of access to information was to increase public confidence in Government and to discourage corruption, arbitrariness and other improper Government conduct.⁴⁰

The effects of corruption in the South African constitutional democracy were well illustrated in the case of *Glenister v the President of the Republic and Others*.⁴¹ In this case, the Constitutional Court held that corruption weakens institutions of democracy, rule of law, foundational values and threatens the capacity of Government to fulfil its obligations as provided for in the Constitution.⁴² The Court went on to state that corruption obstructs sustainable development, economic growth and promotes instability in the country.⁴³ It was within this context that the Constitutional Court affirmed in a recent but unrelated matter of *South African Police Service v Solidarity obo Barnard*,⁴⁴ that the ideal of improving the quality of life and freeing the potential of each and every South African as envisaged in the Constitution can only be achieved through effective, transparent, accountable and

³⁷ Hoexter (2013), at 95.

³⁸ See the Preamble of the PAIA.

³⁹ See S Woolman and M Bishop, *Constitutional Law of South Africa* 2nd ed Volume 4 (2013), at 62-2 (hereafter referred to as Woolman and Bishop (2013)).

⁴⁰ Hoexter (2013), at 94.

⁴¹ 2011 (7) BCLR 651 (CC) (hereafter referred to as *Glenister* case).

⁴² *Glenister* case, para 166 at 696.

⁴³ *Glenister* case, para 166 at 696.

⁴⁴ 2014 (10) BCLR 1195 (CC) (hereafter referred to as *Barnard* case).

responsive governance.⁴⁵ Since 1994, the right of access to information has been pivotal in ensuring that there is responsive governance, accountability and openness in the new South African constitutional legal order.

Other commentators such as Rautenbach and Malherbe have stated that access to information is essential for the exercise of the other rights contained in the Bill of Rights such as freedom of religion, thought, belief and opinion.⁴⁶ The point made by Rautenbach and Malherbe is underscored in the Preamble of the PAIA which states that the right of access to information enables all South Africans to fully exercise and protect all of their rights entrenched in the Constitution.⁴⁷ In addition, some legal scholars have stated that section 32 of the Constitution and the PAIA, are part of the broad constitutional project of establishing a democratic system of Government.⁴⁸

Moreover, since 1994, South African courts have produced numerous judgments focusing on the interpretation of the right of access to information. In the matter of *Brümmer v the Minister for Social Development and Others*,⁴⁹ the Constitutional Court stated, *inter alia*, that to give effect to the founding values of accountability, responsiveness and openness the public must have access to information held by the State.⁵⁰ Therefore, this body of literature and various cases decided under the new constitutional dispensation will be studied and assessed to evaluate the development of the right of access to information in the new South African constitutional legal order.

1.6 The Structure of the Study

The investigation in this thesis is structured over five chapters. Chapter 1 provides a general introduction of the subject of the thesis. Chapter 2 provides a brief historical overview and highlights some old apartheid laws that suppressed and restricted access to information before 1994. Chapter 3 focuses mainly on the current constitutional framework in South Africa. The current constitutional framework will

⁴⁵ *Barnard case*, para 33 at 1206.

⁴⁶ See IM Rautenbach and EFJ Malherbe, *Constitutional Law* 6th ed (2012), at 435 (hereafter referred to as Rautenbach and Malherbe (2012)).

⁴⁷ See the Preamble of the PAIA.

⁴⁸ See I Currie and J De Waal, *The Bill OF Rights Handbook* 6th ed (2013), at 699 (hereafter referred to as Currie & De Waal (2013)).

⁴⁹ 2009 (11) BCLR 1075 (CC) (Hereafter referred to as the *Brümmer case*).

⁵⁰ *Brümmer case*, para 62 at 1095.

cover a discussion regarding the adoption of the Interim Constitution and its successor, the Constitution. Moreover, this chapter provides a brief discussion on the process of enacting the PAIA. Chapter 4 focuses on various judicial judgments that have dealt with the right of access to information under the new constitutional dispensation. Lastly, chapter 5 contains a summary and conclusion. The purpose of the summary and conclusion are to highlight how the right of access to information has developed under the new South African constitutional dispensation. This chapter further highlights the importance of this right in the South African new paradigm of constitutionalism.

1.7 Conclusion

The Preamble to the Constitution records the vision and aspirations of all South Africans. Amongst the constitutional aspirations enshrined in the said Preamble is the promotion of reconciliation to heal the divisions created by the apartheid legal order and the establishment of an open democratic South Africa.⁵¹ It is therefore important to evaluate how the South African courts have fared in developing the right of access to information, thus fulfilling the vision of establishing an open democratic society premised upon the values of accountability, responsiveness and openness. However, it is imperative to investigate the history of access to information before 1994 in order to provide a pertinent historical context within which the development of the right of access to information can be understood. The next chapter outlines the historical overview of the apartheid legal order before 1994.

⁵¹ See the Preamble of the Constitution.

Chapter 2: A brief historical overview of the apartheid legal order before 1994

2.1 Introduction

The purpose of this chapter is to provide a brief historical overview of the apartheid legal framework before 1994. The basic focus of this chapter is on the apartheid legal framework that effectively suppressed and restricted access to information and freedom of expression. This chapter does not give a sequence of historical events before 1994, but sketches the significant legal framework and historical events that contributed towards the culture of secrecy, unresponsiveness and abuse of State power under the apartheid legal order.⁵²

2.2 Historical Background

Unlike the current South African constitutional dispensation where the Constitution is the supreme law of the country, the basic constitutional structure before 1994 was premised upon what was known as parliamentary sovereignty.⁵³ The notion of parliamentary sovereignty entailed that the Parliament was supreme and authorised to pass, amend and repeal any law on any subject or override any right found in the common law.⁵⁴ In other words, the judiciary had no power to test the legality of the laws passed by the Parliament of South Africa.⁵⁵ In the case of *Sachs v Minister of Justice; Diamond v Minister of Justice*,⁵⁶ the Court defined the notion of parliamentary sovereignty as a system where Parliament could encroach on the life, liberty or property of any person subject to its way.⁵⁷

Moreover, the concept of judicial review which has become an important feature in the current South African constitutional dispensation, was effectively non-existent in the apartheid legal order. The Parliament of South Africa passed a plethora of laws

⁵² See the Preamble of the PAIA.

⁵³ J Dugard, *Human Rights and the South African Legal Order* (1978), at 6 (hereafter referred to as Dugard (1978)).

⁵⁴ Currie & De Waal (2013), at 3.

⁵⁵ Dugard (1978), at 6.

⁵⁶ *Sachs v Minister of Justice* 1934 AD 11 (hereafter referred to as *Diamond case*).

⁵⁷ *Diamond case*, at 37.

directed at placing restrictions on access to information and freedom of expression.⁵⁸ Some of these apartheid laws imposed censorship and prescribed serious penalties for disobedience of the laws. It is therefore necessary to outline some of these apartheid laws and their impact on South African society before 1994.

In 1956, the apartheid government passed a piece of legislation which was known as the Official Secrets Act.⁵⁹ The purpose of the Official Secrets Act was to provide for the prohibition of the publication or communication of information involving police and security matters. The Official Secrets Act protected the police from hostile scrutiny and prohibited any publication of information pertaining to the activities of the police.⁶⁰ In 1974, the apartheid government passed legislation that became known as the Publications Act.⁶¹ According to the Publications Act, the administrative agencies were empowered to ban both the imported and locally published works which were considered undesirable, harmful and prejudicial to the safety of the State.⁶² In essence, these pieces of legislations inhibited both the international and local media from reporting on the widespread gross human rights violations perpetrated by the security police under the guise of protecting the security of the State.

On 2 July 1982, the Internal Security Act came into force.⁶³ The Internal Security Act consolidated and replaced a number of earlier security laws such as the Suppression of Communism Act, the Terrorism Act, the Unlawful Organisation Act and parts of the Riotous Assemblies Act. The purpose of the Internal Security Act was to give the apartheid Government broad powers to, amongst other things, ban publications, individuals, and organisations and to detain people without trial.⁶⁴ In terms of the Internal Security Act, the Minister of Justice was empowered to prevent individuals banned under this law from practising as journalists. 1982 also saw the Protection of Information Act enacted in South Africa.⁶⁵ The purpose of the Protection of Information Act is to provide for the protection and prohibition of obtaining and

⁵⁸ See, for instance the Defence Act 44 of 1957 and Internal Security Act 74 of 1982 etc.

⁵⁹ Act 2 of 1956.

⁶⁰ Dugard (1978), at 182.

⁶¹ Act 42 of 1974.

⁶² Dugard (1978), at 192.

⁶³ Act 74 of 1982.

⁶⁴ See Dugard (1978), at 183.

⁶⁵ Act 84 of 1982.

disclosing certain information.⁶⁶ It is important to note that the Protection of Information Act remains an enforceable piece of law as it has not yet been repealed in South Africa's new constitutional legal order. However, the Ministry of State Security has indicated that the Protection of Information Act is not compatible with the Constitution and the scheme of the PAIA. It has been argued that the Protection of Information Act is not geared to offer adequate protection against information peddlers and foreign intelligence services that conduct espionage within the South African borders.⁶⁷

The above-mentioned draconian apartheid laws were indeed designed to empower the apartheid government and the security police to systematically assume a strongly centralised and authoritarian control of South Africa.⁶⁸ In the *Independent Newspaper* case, Sachs J noted in his judgment that the apartheid security police and the military enjoyed great powers which resulted in them becoming a law unto themselves.⁶⁹ The effect of the apartheid legal framework in fostering the systemic culture of secrecy which resulted in gross human rights violations cannot be overemphasised.

Some of the human rights violations perpetrated by the military and the security police during the apartheid era were revealed at the Truth and Reconciliation Commission (TRC) hearings.⁷⁰ The TRC was appointed to investigate the nature, causes and the extent of gross violations of human rights committed in South Africa between 1 March 1960 and 1994.⁷¹ The TRC played an important role in the process of transitional justice and reconciliation in South Africa. It should be pointed out that the wrath of the apartheid government was not only limited within but went beyond the borders of South Africa.⁷²

The international human rights organisation known as Article 19 documented, in its World Report of 1988, the measures employed by the apartheid government to

⁶⁶ See the long title of the Protection of Information Act.

⁶⁷ See, Protection of Information Bill Public Hearings www.ssa.gov.za/Portals/0/SSA%20docs/Speeches/2010/Response%20to%20Public%20Hearings%20POIB%2017%20September%202010.pdf (accessed: 7/07/2014).

⁶⁸ *First Certification judgment*, para 9 at 1266-1267.

⁶⁹ *Independent Newspapers case*, para 154 at 823.

⁷⁰ The Truth and Reconciliation Commission was appointed in terms of the Promotion of National Unity and Reconciliation Act, No 34 of 1995 (hereafter referred to as the TRC Act).

⁷¹ See the Long title of the TRC Act.

⁷² This position was confirmed in *S v Basson 2007 (3) SA 582* para 13 at 601.

prevent both national and international media from reporting independently about the unrest and the activities of the security forces in South Africa.⁷³ According to this report, ordinary South Africans were prevented from accessing information that was considered undesirable and the international media could not report on what was taking place inside the country.⁷⁴ The report stated further that an estimated 15,000 people, including children, were detained in South Africa during the State of Emergency declared in June 1986 and renewed in June 1987. The Bureau of Information was the only authorised source of information emanating from the State of Emergency.

2.3 Conclusion

Notwithstanding the afore-mentioned strife of the apartheid legal order, the announcement by the erstwhile State President F.W. De Klerk to unban all the liberation movements and to release political prisoners has been described as a turning point in the history of South Africa.⁷⁵ This important milestone in South African history was the beginning of free political activities and the commencement of multi-party negotiations.⁷⁶

The transition from apartheid to a constitutional legal order marked the end of a repressive regime and paved the way for the establishment of an open democratic South Africa premised on a legal culture of accountability and transparency.⁷⁷ Before discussing the developments relating to the right of access to information under the current South African constitutional dispensation, it is important to set out briefly the new constitutional framework that superseded the apartheid legal order. The new constitutional framework is set out below.

⁷³ See, Article 19 World Report 1988 '*Information, Freedom and Censorship*', at 41 <http://www.article19.org/data/files/pdfs/publications/world-reports-1988.pdf> (accessed:09/07/2014). (hereafter referred to as Article 19 Report of 1988)

⁷⁴ See Article 19 Report 1988 at 40.

⁷⁵ Currie and De Waal (2013), page 4.

⁷⁶ See, CODESA negotiations <http://www.sahistory.org.za/article/CODESA> (accessed:08/07/2014).

⁷⁷ *Shabalala* case, para 26 at 1605.

Chapter 3: The New Constitutional Framework

3.1 Introduction

The purpose of this chapter is to briefly set out related features of the new South African constitutional and legal framework. This chapter does not delve too deeply into all aspects of the new constitutional framework but sketches the relevant issues. In December 1991, following the unbanning of liberation movements and the release of political prisoners, the Convention for a Democratic South Africa (CODESA) was convened to negotiate and configure a new constitutional framework in South Africa.⁷⁸ This multi-party forum was later referred to as CODESA 1, following its collapse in the face of disagreements between the negotiating political parties. However, in April 1993, the multi-party negotiations resumed at what became known as CODESA 2.⁷⁹ It was at this forum that the Interim Constitution was agreed upon.

3.2 The Interim Constitution of 1993

On 28 January 1994, the Interim Constitution was promulgated and came into effect on 27 April 1994.⁸⁰ However, prior to the finalisation of the Interim Constitution two serious challenges confronted the multi-party negotiators. These two challenges were poignantly described by the Constitutional Court in the *First Certification judgment* as follows:

The first arose from the fact that [the multi-party negotiators] were not elected to their positions in consequence of any free and verifiable elections and that it was therefore necessary to have this commitment articulated in a final Constitution adopted by a credible body properly mandated to do so in consequence of free and fair elections based on universal adult suffrage. The second problem was the fear in some quarters that the constitution eventually favoured by such a body of elected representatives might not sufficiently address the anxieties and the insecurities of such constituencies and might therefore subvert the objectives of a negotiated settlement.⁸¹

This stalemate was overcome by agreeing on a two-stage transition where power would be transferred to an interim government established under the Interim Constitution. The interim government would govern the country on a coalition basis

⁷⁸ Currie & De Waal (2013), at 4.

⁷⁹ See, CODESA negotiations <http://www.sahistory.org.za/article/codesa-negotiations> (Accessed: 08 /07/2014).

⁸⁰ Rautenbach and Malherbe (2012), at 17.

⁸¹ *First Certification judgment*, para 12 at 1268.

while the elected Constitutional Assembly drafted the final constitutional text.⁸² This commitment was expressed in the Preamble of the Interim Constitution which enjoined elected representatives of all the people of South Africa to adopt a new Constitution in accordance with the Constitutional Principles contained therein.⁸³ In addition, the final constitutional text had to comply with the 34 Constitutional Principles contained in schedule 4 of the Interim Constitution.⁸⁴ Finally, the newly established Constitutional Court was seized with the important duty to certify the compliance of the final constitutional text with the 34 Constitutional Principles before it could come into force.⁸⁵

The Interim Constitution which was described in the case of *S v Makwanyane*,⁸⁶ as a transitional constitution was then adopted by the last apartheid Parliament (Tricameral Parliament) in December 1993.⁸⁷ It is generally known that on 27 April 1994, South Africa became a constitutional state. The supremacy of the Interim Constitution was proclaimed in section 4(1) of the Interim Constitution.⁸⁸ Every person irrespective of gender, colour, race or creed was afforded a catalogue of fundamental rights.⁸⁹ As part of the catalogued rights in chapter 3 of the Interim Constitution, a stand-alone right of access to information was entrenched.⁹⁰

To ensure that provision was made for freedom of information in the final constitutional text, the drafters of the Interim Constitution included Constitutional Principle IX in Schedule 4 to safeguard the notion of openness and accountability in all spheres of Government.⁹¹ After the first democratic elections on 27 April 1994, the Constitutional Assembly consisting of both the Senate and the National Assembly was tasked to draft the new constitutional text within two years of the first sitting of the National Assembly.⁹² Consequently, on 8 May 1996, the Constitutional Assembly adopted the new constitutional text.⁹³ In compliance with section 71 of the Interim

⁸² *First Certification judgment*, para 13 at 1268.

⁸³ See the Preamble of the Interim Constitution.

⁸⁴ *First Certificate judgment*, para 13 at 1268.

⁸⁵ S71 (1), (2) and (3) of the Interim Constitution.

⁸⁶ 1995 (6) BCLR 665 (CC) para 7 at 676.

⁸⁷ Currie & De Waal (2013), at 4.

⁸⁸ S4 (1) of the Interim Constitution.

⁸⁹ Chapter 3 of the Interim Constitution.

⁹⁰ S23 of the Interim Constitution.

⁹¹ See Constitutional Principle IX in Schedule 4 of the Interim Constitution.

⁹² S73 (1) of the Interim Constitution.

⁹³ *First Certification judgment*, para 21 at 1271.

Constitution, the final constitutional text was referred to the Constitutional Court to pronounce whether or not the provisions therein were in compliance with the 34 Constitutional Principles set out in the Interim Constitution.⁹⁴

In making its decision, the Constitutional Court had to consider whether or not the basic structures and premises of the new constitutional text were in accordance with the Constitutional Principles contained in the Interim Constitution. The Court identified the following as fundamental to the structures and premises of the new constitutional text:

- (a) A constitutional democracy based on the supremacy of the Constitution protected by an independent judiciary.
- (b) A democratic system of government founded on openness, accountability and equality, with universal adult suffrage and regular election.
- (c) A separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness.⁹⁵

It became clear therefore that the values of accountability, responsiveness and openness constitutes the foundation upon which the new constitutional legal order is to be premised. In addition, the Constitutional Court found section 32(1) of the new constitutional text which accorded the right of access to any information held by the State and any information that is held by another person that is required to exercise or protect any rights, to be in compliance with Constitutional Principle IX.⁹⁶ In its judgment, the Court went on to consider the transitional measure that was contained in section 23 of schedule 6 of the new constitutional text, which effectively suspended the operation of section 32(1) for three years until the legislation envisaged therein was enacted.⁹⁷ The Constitutional Court held that if the legislation envisaged in section 32(2) was not enacted timeously, the transitional arrangement contained in section 23 of schedule 6 and section 32(2) of the new constitutional text would fall away.⁹⁸ Furthermore, the general but undefined right formulated in section 32(1) would come into operation.⁹⁹ In as much as the Court had certified section 32(1) to be in compliance with Constitutional Principle IX, there were instances of

⁹⁴ S71 of the Interim Constitution.

⁹⁵ *First Certification judgment*, para 45 at 1277.

⁹⁶ *First Certification judgment*, para 82 at 1291.

⁹⁷ *First Certificate judgment*, para 82 at 1291.

⁹⁸ *First Certification judgment*, para 83 at 1291.

⁹⁹ *First Certification judgment*, para 86 at 1292.

noncompliance in other provisions of the new constitutional text.¹⁰⁰ Hence, the Constitutional Court refused to certify the new constitutional text and referred it back to the Constitutional Assembly. As a result therefore, the Constitutional Assembly had to reconvene to consider matters raised by the Constitutional Court in the *First Certification judgment*.

On 11 October 1996, the Constitutional Assembly adopted the amended text of the final Constitution.¹⁰¹ In the case of *In Re: Certification of the Amended Text of the Constitution of the Republic of South Africa*,¹⁰² the Constitutional Court was called upon to again perform its certification function set out in section 71 of the Interim Constitution. In the *Second Certification judgment*, the Constitutional Court concluded that the Constitutional Principles had been complied with and therefore unanimously approved the constitutional text.¹⁰³

3.3 The Constitution

On 10 December 1996, the Constitution was signed into law by the first democratically elected President of the Republic of South Africa, Mr Nelson Mandela and it came into force in February 1997. As indicated above, the Constitution is the supreme law of the country and provides for a justiciable Bill of Rights which entrenches and catalogues a range of human rights.¹⁰⁴ The Bill of Rights is regarded as a cornerstone of democracy in South Africa's new constitutional dispensation.¹⁰⁵ Furthermore, the Constitution demands that the South African courts interpret the rights entrenched in the Bill of Rights in a manner that promotes the values underpinning an open democratic South Africa.¹⁰⁶ It is clear therefore that the South African courts have an important role to play in terms of interpreting all the rights, including the right of access to information in a manner that promotes the values of openness and democracy in South Africa's new constitutional legal order.

¹⁰⁰ *First Certification judgment*, para 482 at 1398.

¹⁰¹ Currie & De Waal (2013), at 6.

¹⁰² 1997 (1) BCLR 1 (CC) (hereafter referred to as the *Second Certification judgment*).

¹⁰³ *Second Certification judgment*, para 205 at 60.

¹⁰⁴ S2 of the Constitution.

¹⁰⁵ S7 (1) of the Constitution.

¹⁰⁶ S39 (1) (a) of the Constitution.

It is interesting to note, that given the repressive and tumultuous history before 1994, the Constitution demands that the democratic State's security apparatus adapt to the overarching transformation of South Africa.¹⁰⁷ The values of accountability and transparency as espoused in the Constitution have had to find its way into the architecture of the new democratic security apparatus.¹⁰⁸ It has been mentioned above, that prior to the current democratic dispensation the South African security services were a law unto themselves and perpetrated gross human rights violations. It is perhaps fitting to briefly underscore the effects of the Constitution on the South African democratic security apparatus. In order to give effect to the values of accountability and transparency, the Constitution provides for a multi-party parliamentary committee to oversee all security services in a manner determined by national law or the rules and orders of Parliament.¹⁰⁹

As far as the South African intelligence structures are concerned, the Intelligence Services Oversight Act provides for the Parliamentary Committee known as the Joint Standing Committee on Intelligence (JSCI).¹¹⁰ The JSCI has an oversight mandate over the functions of all intelligence structures in South Africa. This committee is constituted on the basis of proportional representation as provided for in the Oversight Act.¹¹¹ The oversight mandate of the JSCI extends to the intelligence services such as the State Security Agency (SSA), the South African Police Services Crime Intelligence Division (SAPS-CI) and the Defence Intelligence (DI) of the South African National Defence Force. Furthermore, the above-mentioned intelligence structures are subject to civilian monitoring by an Inspector-General of Intelligence (IGI) appointed by the President and approved by the National Assembly with a supporting vote of at least two-thirds of its members.¹¹² Members of the opposition parties are part of the JSCI and participate in the process of appointing the IGI.

The IGI is appointed in terms of the Oversight Act to, amongst other things, monitor compliance by the intelligence structures with the Constitution, applicable laws and

¹⁰⁷ See, White Paper on Intelligence' <http://www.ssa.gov.za> (accessed: 02/08/2014).

¹⁰⁸ S199 (8) of the Constitution.

¹⁰⁹ S199 (8) of the Constitution.

¹¹⁰ S2 of the Intelligence Services Oversight Act (Act 40 of 1994) (hereafter referred to as Oversight Act).

¹¹¹ S2 (1) of the Oversight Act.

¹¹² S2 10 (b) of the Constitution.

relevant policies on intelligence and counter-intelligence.¹¹³ It was within this context, that the Constitutional Court stated in the *Independent Newspaper* case that the current legal order requires intelligence services that operate within the boundaries of the Constitution and subject to civilian oversight.¹¹⁴

One of the most vital changes in the Constitution was the extension of the scope of the right of access to information to include the right of access to information held by the State and the limited right of access to information held by another person. Furthermore, the PAIA was enacted to provide a legal framework and to give effect to the right of access to information and to provide for reasonable measures to alleviate the administrative and financial burden on the State.¹¹⁵ In other words, the PAIA is intended to regulate and give content to the right of access to information. A brief discussion on the process of enacting the PAIA follows.

3.4 Promotion of Access to Information Act (PAIA)

On 25 June 1999, former President Thabo Mbeki addressed the opening of the National Assembly and assured the nation of Government's commitment to honest, transparent, accountable norms and to act against anyone who transgressed these norms.¹¹⁶ In January 2000, following a long drawn-out process of consultation with interested parties the National Assembly passed the Open Democracy Bill. In February 2000, the President signed the Open Democracy Bill into law under the name of the Promotion of Access to Information Act 2 of 2000 (PAIA).¹¹⁷ The Preamble of the PAIA enjoined both public and private bodies to promote transparency, accountability and effective governance in the new South African constitutional dispensation.¹¹⁸ Furthermore, the PAIA enables the people of South Africa to fully exercise and protect all of their rights enshrined in the Constitution.¹¹⁹ In addition, section 9 provides for the objects of the PAIA. These objects read as follows:

¹¹³ S7 (7) of the Oversight Act.

¹¹⁴ *Independent Newspaper* case, para151 at 821.

¹¹⁵ S32 (2) of the Constitution.

¹¹⁶ See Thabo Mbeki, 'Opening of the National Assembly', Cape Town - 25 June 1999 <http://www.dfa.gov.za/docs/speechs/Mbeki.htm> (accessed on 14/05/2015).

¹¹⁷ Currie and De Waal (2013) at 694.

¹¹⁸ See the Preamble of the PAIA.

¹¹⁹ See the Preamble of the PAIA.

- (a) to give effect to the constitutional right of access to-
 - (i) any information held by the State; and
 - (ii) any information that is held by another person and that is required for the exercise or protection of any right;
- (b) to give effect to that right-
 - (i) subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and
 - (ii) in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution;
- (c) to give effect to the constitutional obligations of the State of promoting a human rights culture and social justice, by including public bodies in the definition of 'requester' allowing them, amongst others, to access information from private bodies upon compliance with four requirements in this Act, including an additional obligation for certain public bodies in certain instances to act in the public interest;
- (d) ...
- (e) generally, to promote transparency, accountability and effective governance of all public and private bodies.¹²⁰

Moreover, section 2 (1) of the PAIA prescribes that when the provisions of the PAIA are interpreted, the courts must adopt any reasonable interpretation consistent with the objects set out above.¹²¹ In other words, when interpreting the provisions of the PAIA, the courts must, amongst other things, promote the values of transparency, accountability and effective governance in both public and private bodies. In this context, the objects of the PAIA are further bolstered by section 195 of the Constitution which expressly demands that the public administration be governed by the democratic values of, amongst other things, accountability and transparency.¹²² There is no doubt therefore that the right of access to information and the PAIA forms the basis through which the establishment of an open democratic South African society premised on the legal culture of accountability, responsiveness and openness are to be realised.

¹²⁰ S9 of the PAIA.

¹²¹ S2 (1) of the PAIA.

¹²² S195 (1) (f) and (g) of the Constitution.

3.5 Conclusion

In conclusion, the South African courts, particularly the Constitutional Court have since 1994, delivered a number of important judgments that have dealt with the right of access to information. The case law produced since 1994 provides an essential measure of the development of the right of access to information. It is this jurisprudence that will indicate whether or not the courts have managed to interpret the right of access to information in a manner that entrenches a legal culture of accountability, responsiveness and openness in South Africa. The following chapter evaluates various judgments relating to the right of access to information.

Chapter 4: Analysis of the Development of the Right of Access to information: Judicial precedent since 1994

4.1 Introduction

The purpose of this chapter is to evaluate the case law that forms the body of jurisprudence relating to the right of access to information. Before evaluating such cases, it is important to underscore the role of the South African judiciary in the new democratic dispensation. Firstly, it is important to recognise that the Constitution as the supreme law of the country accords judicial authority to the courts of law to interpret and apply the law, including the Constitution and its Bill of Rights unequivocally.¹²³ In the process of judicial interpretation the courts have an obligation to take the moral and ethical principles and values underpinning the Constitution into account.¹²⁴ It stands to reason therefore that the foundational values of accountability, responsiveness and openness constitute the core values driving the interpretation of the Constitution.

As mentioned above, the Constitutional Court in the *First Certification judgment* recognised that the purpose of the right of access to information was to guarantee an open and accountable administration at all levels of Government.¹²⁵ It is therefore important to evaluate the case law relating to the right of access to information and to establish the extent to which the interpretation of this right has promoted the establishment of an open democratic society premised on expressed constitutional values of accountability, responsiveness and openness. It is within this context therefore that the judicial precedent relating to the development and the evolution of the right of access to information is being explored.

¹²³ B Bekink, *Principles of South African Constitutional Law* (2012), at 375 (hereafter referred to as Bekink (2012)).

¹²⁴ Bekink (2012), at 375.

¹²⁵ *First Certification judgment* case, para 83 at 1291.

4.2 Analysis of the Development

Soon after the right of access to information was entrenched in section 23 of the Interim Constitution, it became a source of much debate amongst legal scholars and in different divisions of the South African courts. The right of access to information was soon relied upon when accused persons required access to police dockets that contained particulars of witnesses and other evidences against them.¹²⁶ Ever since South Africa became a constitutional state, cases that have dealt with the interpretation of the right of access to information have increased substantially. Consequently, the South African courts have had to confront the issue relating to the application of the right of access to information contained in section 23 of the Interim Constitution in criminal proceedings. In this context, the common law privilege relating to the refusal of access to the contents of the police dockets as defined in *R v Steyn*,¹²⁷ took centre stage in criminal proceedings.

In interpreting section 23 of the Interim Constitution, the Court in the case of *Qozeleni v the Minister of Law and Order and Another*,¹²⁸ held that the right of access to information was not simply a constitutional right to discovery in criminal cases, but was also a necessary tool in the process to establish an open democratic society committed to the principles of openness and accountability.¹²⁹ The Court also held that the application of section 23 should not be restricted but be extended to non-judicial remedies aimed at exercising or protecting such rights.¹³⁰ The Court therefore found that the applicant's right to information had been infringed by the refusal of access to the police docket.¹³¹ This case clearly demonstrated the Court's determination to interpret the right of access to information in a manner that promoted an open democratic South Africa premised on the values of accountability and openness.

¹²⁶ See for instance *Nortje and Another v Attorney General of the Cape and Another* 1995 (2) BCLR 236 (C); *Phato v Attorney-General, Eastern Cape, and Another* 1995 (1) SA 799 and the *Shabalala* case.

¹²⁷ 1954 (1) SA 324 (hereafter referred to as *R v Steyn* case).

¹²⁸ 1994 (3) SA 625 (hereafter referred to as *Qozeleni* case).

¹²⁹ *Qozeleni* case, para E-F at 642.

¹³⁰ *Qozeleni* case, para F-G at 642.

¹³¹ *Qozeleni* case, para H-I at 642.

In *Khala v the Minister of Safety and Security*,¹³² where the Court had to first decide whether the information in the docket was indeed required by the plaintiff and whether section 23 was intended to be used in litigation to obtain discovery from the State.¹³³ The Court specifically emphasised that the purpose of section 23 was to enable a person to gain access to information in the State's possession in order to facilitate an open democratic South Africa.¹³⁴ In answering the first issue, the Court considered the meaning of the word "required" which was used in section 23 and held that it needed to be given a generous and purposive interpretation.¹³⁵ In this context, the Court stated that a person was entitled to have access to information held by the state in so far as such information was required for the exercising or protection of his or her right.¹³⁶ However, the Court acknowledged that it was not possible to give the word "required" a specific meaning unless a proper factual enquiry was followed. Ultimately, the Court concluded that the plaintiff required the information in the police docket to protect or exercise his right and that it was appropriate to use section 23 to obtain discovery of documents from the State.¹³⁷

In contrast the Court in the matter of *Directory Advertising v the Minister for Posts, Telecommunications etc. and Broadcasting and Others*,¹³⁸ departed from the approach adopted in the *Khala* and *Qolezeni* judgments which had given section 23 a more generous and purposive interpretation. The generous and purposive interpretation entailed that the common law rights that were not catalogued in the Interim Constitution received the same protection given to the enshrined rights in the Interim Constitution. In the *Directory Advertising* case, the Court held that the word 'rights' as contained in section 23 of the Interim Constitution needed to be interpreted as referring to only the rights contained in chapter 3 of the Interim Constitution.¹³⁹ The Court felt that there was no need to offer protection to common law rights because the rights in chapter 3 were wide and encompassing.¹⁴⁰

¹³² 1994 (4) SA 218 (hereafter referred to as *Khala* case).

¹³³ *Khala* case, para F-G at 224.

¹³⁴ *Khala* case, para C-D at 225.

¹³⁵ *Khala* case, para C-D-E at 225

¹³⁶ *Khala* case, para G-H at 226.

¹³⁷ *Khala* case, para G-H at 226.

¹³⁸ 1996 (2) all SA 83 (T) (hereafter referred to as *Directory Advertising* case)

¹³⁹ *Directory Advertising* case, para B-C at 94.

¹⁴⁰ *Directory Advertising* case, para A-C at 94.

However, the Court in the matter of *Nisec (Edms) Bpk v Western Cape Provincial Tender Board and Others*,¹⁴¹ disagreed with the narrow interpretation followed by the court in the *Directory Advertising* case. The court expressed reservations about the approach adopted in the *Directory Advertising* case as it was against the very purpose of entrenching section 23, which was to enable citizens to enforce their rights against the State, many of which were derived from sources outside of the Interim Constitution, such as the common law.¹⁴² The Court affirmed the purposive interpretation of section 23 as it strengthened the objective of an open democratic society envisaged by the Interim Constitution.¹⁴³ Thus, the Court supported the approach adopted in the *Khala* case as it extended section 23 to include common law rights which were outside the ambit of the Interim Constitution.¹⁴⁴

In *Phato v Attorney-General, Eastern Cape, and Another*,¹⁴⁵ the Court explained that the purpose of section 23 was to correct the practises which made it possible for Government to refuse to disclose information and escape accountability even if the rights of individuals were affected.¹⁴⁶ The Court affirmed the conclusion reached by the Courts in the *Qolezeni* and *Khala* cases that section 23 of the Interim Constitution had to apply to both civil and criminal litigation. The Court went on to explain that the demonstrable fairness and openness promote public confidence in Government and the judicial process as well as being crucial to the good administration of justice.¹⁴⁷ The Court concluded, therefore, that section 23 had to be given a proper and purposive interpretation which recognised the values of openness and accountability in Government's conduct.¹⁴⁸ In view of the above cases, it was clear that the majority of the South African courts supported a purposive interpretation of section 23 which promoted the values of openness and accountability in South Africa.

In another case of *Nortje and Another v the Attorney-General of the Cape and Another*,¹⁴⁹ the applicant had approached the Supreme Court seeking review and

¹⁴¹ 1997 (3) BCLR 367 (C) (hereafter referred to as *NISEC* case).

¹⁴² *NISEC* case, para H-I at 374.

¹⁴³ *NISEC* case, para H-I-J at 374.

¹⁴⁴ *NISEC* case, para B-C-D at 375.

¹⁴⁵ 1995 (1) SA 799 (hereafter referred to as *Phato* case).

¹⁴⁶ *Phato* case, para D-E at 815.

¹⁴⁷ *Phato* case, para E-F at 815.

¹⁴⁸ *Phato* case, para C-D at 832.

¹⁴⁹ 1995 (2) BCLR 236 (C) (hereafter referred to as *Nortje* case).

setting aside of the decisions taken by the prosecutor and the regional court to deny him access to copies of the statements made by State witnesses before the trial began. The issue in this case was whether the applicant was entitled to have full access to the statements of witnesses before the commencement of the trial.¹⁵⁰ The applicant invoked section 23 of the Interim Constitution, alleging that since the inception of the Interim Constitution an accused person was entitled to have access to the statements contained in the police dockets.¹⁵¹ The Court again considered the word 'required' used in section 23 and stated that this word had to be understood to mean 'reasonably required'.¹⁵² Although the Court found that statements of witnesses to be called would ordinarily be reasonably required for an accused person to prepare for his trial in criminal cases, it did not extend to information privileged in law.¹⁵³

In the *Shabalala* case, as was mentioned above, the Constitutional Court was called upon to determine, amongst other things, whether or not section 23 read with section 25 of the Interim Constitution entitled an accused person to access police dockets as a right.¹⁵⁴ Secondly, whether or not the common law privilege relating to access to police documents as defined in *R v Steyn* was consistent with the Interim Constitution. In making its decision, the Court examined the right of access to information, the right to a fair trial which was entrenched in section 25 and the limitation provision provided for in section 33 of the Interim Constitution.¹⁵⁵ These provisions were examined in light of section 35 of the Interim Constitution which enjoined a court of law to promote the values which underlined an open democratic society in the process of interpreting the provisions of the Interim Constitution.¹⁵⁶

Moreover, the Constitutional Court held that the enquiry in such cases was whether or not the accused person was entitled to the police docket in terms of a right to a fair trial protected in section 25(3) of the Interim Constitution. The Court further held that if an accused person failed to assert his right in terms of section 25(3), there was nothing that could make him succeed on the application based in section 23 of

¹⁵⁰ *Nortje* case, para D-E at 244.

¹⁵¹ *Nortje* case, para D-E-F at 246.

¹⁵² *Nortje* case, para H-J at 250.

¹⁵³ *Nortje* case, para F-G-H at 250.

¹⁵⁴ *Shabalala* case, para 9 at 1599.

¹⁵⁵ *Shabalala* case, para 23 at 1604.

¹⁵⁶ *Shabalala* case, para 24 at 1604.

the Interim Constitution. Furthermore, the Court found that section 25 had to be read in conjunction with section 23 and take into consideration the legal culture of accountability and transparency manifested both by the Preamble to the Interim Constitution and the detailed provisions of Chapter 3 of the Interim Constitution.¹⁵⁷

The *Shabalala* case illustrates that the Constitutional Court had placed a high premium in promoting the values underlying an open democratic society in the process of interpreting the right of access to information. It was in this context, that the Constitutional Court declared the blanket docket privilege articulated in *R v Steyn* as unreasonable, unjustifiable and unnecessary in an open democratic society.¹⁵⁸ With the repeal of the Interim Constitution by the Constitution in 1996, the South African courts continued to be seized with the interpretation of the right of access to information which is now enshrined in section 32 of the Constitution. The evaluation that follows mainly focuses on the cases that have been decided by the Constitutional Court.

Prior to the enactment of the PAIA, the Constitutional Court in the matter of *Ingledeu v the Financial Services Board and Others*,¹⁵⁹ was confronted with the issue of the interface between the discovery of documents and the pre-action discovery in terms of section 32(1) of the Constitution. In this case, the Court had to consider an appeal by Mr Ingledeu (applicant) against the High Court decision to refuse his application for an order compelling the Financial Services Board to furnish him with the full record of an investigation by the Board into alleged insider trading. The applicant claimed that he was entitled to the information in terms of rule 35(14) of the Uniform Rules of Court. The applicant further contended that this sub-rule should be interpreted purposively and in line with section 32(1) (a) of the Constitution.¹⁶⁰ In the alternative, the applicant claimed that he was entitled to the information directly under section 32(1) (a) of the Constitution. However, the Court refused to delve into these issues as it was not in the interests of justice to grant the application for leave to appeal.

¹⁵⁷ *Shabalala* case, para 35 at 1608.

¹⁵⁸ *Shabalala* case, para 50 at 1613.

¹⁵⁹ 2003 (8) BCLR 825 (CC) (hereafter referred to as *Ingledeu* case).

¹⁶⁰ *Ingledeu* case, para 14 at 829.

As stated earlier, the enactment of the PAIA provided for a national law that gives effect and forms the basis for the application of the right of access to information. In this regard, the following legal precedents were developed after the enactment of the PAIA. The Western Cape High Court in the case of *Institute for Democracy in SA and Others v African National Congress and Others*,¹⁶¹ had to decide whether the applicant could still rely directly on the right of access to information in section 32 as an independent cause of action. The Court held that section 32 of the Constitution was not capable of serving as an independent legal basis or cause of action for the enforcement of the right of access to information unless the constitutionality of the provisions of the PAIA were directly challenged.¹⁶²

More recently, in 2015, in the matter of *My Vote Counts NPC v Speaker of the National Assembly and Others*,¹⁶³ the applicant did not rely on the provisions of the PAIA but sought to apply section 32 directly for its claim. The majority of the judges of the Constitutional Court held that allowing a litigant to apply section 32 directly, rather than the PAIA would defeat the purpose of the Constitution in requiring the right of access to information to be given effect by means of a national law.¹⁶⁴ In this case, the applicant sought an order compelling the Parliament to pass legislation obliging political parties to disclose the source of their private funding.¹⁶⁵ The applicant had argued that the information related to political parties' private funding was essential to the right to vote.

The significant development in the *Idasa* case and recently in the *My Vote Counts* case is the affirmation that the PAIA is a statutory basis upon which the right of access to information have to be enforced in South Africa. In other words, as the PAIA gives effect to section 32 of the Constitution, any enforcement of the right of access to information is now grounded in the provisions of the PAIA or alternatively challenge the constitutional validity of the PAIA. This is in line with the principle of subsidiarity. The Constitutional Court explained that “when legislation purports to

¹⁶¹ 2005 (10) BCLR (C) (hereafter referred to as *Idasa* case).

¹⁶² *Idasa* case, para 17 at 1002.

¹⁶³ 2015 ZACC 31 (available at <http://www.saflii.org.za>) (accessed: 2/10/2015) (hereafter referred to *My Vote Counts* case).

¹⁶⁴ *My Vote Count* case, para 160 at 70.

¹⁶⁵ *My Vote Count* case, para 2 at 3.

give effect to a right, but fails to do so properly, that subsidiarity requires a constitutional challenge to the deficient legislation”.¹⁶⁶

It is further important to recognise that the PAIA does not apply to records required for criminal or civil proceedings after the commencement of the proceedings.¹⁶⁷ Furthermore, the provisions of the PAIA do not apply to records relating to the judicial functions of a court or a judicial officer and to Cabinet records and its committees.¹⁶⁸ In *PFE International INC (BVI) and Others v. Industrial Development Corporation of South Africa Limited*,¹⁶⁹ the Constitutional Court dealt with the legislative regime regulating the exercise of the right of access to information held by the State after the commencement of legal proceedings. In this regard, the Court considered section 7(1) of the PAIA and Rule 38(1) (a) of the Uniform Rules of Court. In addition, the Court considered three conditions which needed to be met to exclude the application of the PAIA. These conditions were as follows:

- Firstly, access to information must have been sought for purposes of civil or criminal proceedings;
- Secondly, the request must have been made after the commencement of the proceedings; and
- Thirdly, access to the information must have been provided for in another law.

In the *PFE International* case, the Constitutional Court affirmed the decision of the Supreme Court of Appeal to reject the narrow and literal reading of Rule 38(1), preferring an interpretation that promoted wider access to information. The Court confirmed that the decision of the Supreme Court of Appeal was in line with the purpose for the excluding the PAIA in cases where access to information was regulated by the rules of court.¹⁷⁰ The Court focused on the above-mentioned third condition and held that Rule 38(1) constituted a law contemplated in section (1) (c) of the PAIA and therefore the PAIA did not apply to this case.¹⁷¹ This judgment clearly shows that the PAIA does not apply to a request for information in criminal or civil proceedings that have already commenced and where access to information was provided for in another law. However, in the *Independent Newspaper* case, the

¹⁶⁶ *My Vote Count* case, para 66 at 33.

¹⁶⁷ S7 of the PAIA.

¹⁶⁸ S12 of the PAIA.

¹⁶⁹ 2013 (1) SA 1 (CC) (hereafter referred to as *PFE International* case).

¹⁷⁰ *PFE International* case, para 27 at 9.

¹⁷¹ *PFE International* case, para 32 at 11.

Constitutional Court acknowledged that at the very least section 32 of the Constitution creates, subject to certain procedural conditions, a right of discovery of information held by the State or another person.¹⁷²

In 2007, the Constitutional Court in the matter between the *South African Broadcasting Corporation Limited v The National Director of Public Prosecutions*,¹⁷³ held that access to information is significant in building an active citizenry and an open democratic society as envisaged in the Preamble of the Constitution.¹⁷⁴ It was within this context that O'Regan J. stated in the matter of *Khumalo v. Holomisa*,¹⁷⁵ that the media were important agents in ensuring that Government is open, responsive and accountable to the people as envisaged in the founding values of the Constitution.¹⁷⁶ It stands to reason therefore, that without the free flow of information, the media will be hindered from delivering on its constitutional mandate and that would undoubtedly threaten the survival of the South African constitutional democracy. It is thus clear that the right of access to information and a vibrant media encourages accountability, responsiveness and openness in Government matters and allows for citizen activism in matters of public interest.

The importance of the right of access to information and its connection with the foundational values of accountability, responsiveness and openness entrenched in section 1(d) of the Constitution was further underlined in the *Brümmer* case. The Constitutional Court in the *Brümmer* case poignantly described this connection as follow:

The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to the founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information.¹⁷⁷

The above comments by the Constitutional Court underscored the importance of the right of access to information in South Africa's new constitutional dispensation. The Constitutional Court went on to emphasise that the right of access to information has

¹⁷² *Independent Newspaper* case para 23 at 781.

¹⁷³ 2007 (2) BCLR 167 (CC) (hereafter referred to as *SABC* case).

¹⁷⁴ *SABC* case, para 28 at 179.

¹⁷⁵ 2002 (8) BCLR 771(CC) (hereafter referred to as *Holomisa* case).

¹⁷⁶ *Holomisa* case, para 23 at 781.

¹⁷⁷ *Brümmer* case, para 62 at 1095.

developed into an essential tool designed to protect the rights entrenched in the Bill of Rights such as the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.¹⁷⁸ In this case, the Court had to consider the constitutionality of provisions of the PAIA governing the applications to courts, challenging the refusal of access to information.

Moreover, the Constitutional Court in the *Brümmer* case had to consider the extent to which section 78 of the PAIA was consistent with section 32 and 34 of the Constitution. Section 78(2) of the PAIA provides for recourse in the event where internal appeal processes have not been successful. According to this provision an applicant had 30 days within which to apply to a court for appropriate relief in terms of section 82 of the PAIA. The Constitutional Court declared the 30-day limit referred to in section 78 of the PAIA unconstitutional and invalid as it limited the right of access to court and the right of access to information.¹⁷⁹ In this regard, the declaration of invalidity was suspended for 18 months. As an interim arrangement, the Court replaced the 30-day period with a 180-day period which commences on the date when a requester receives notice of the decision on internal appeal.¹⁸⁰

The interpretation adopted by the Court in the *Brümmer* case, confirms that the right of access to information plays a pivotal role in entrenching the constitutional values of accountability, responsiveness and openness in the new South African constitutional order. The Court's emphasis on the need to deal with access to information disputes expeditiously further illustrates the Constitutional Court's determination to interpret this right in a manner that favours access to information. It goes without saying that this approach adopted by the Constitutional Court is directed at strengthening the legal culture of accountability, responsiveness and openness, thus safeguarding the new South African constitutional legal order.

The direct link between the right of access to information and the protection of other rights such as the right to vote has been underscored by the Constitutional Court. In *President of the Republic of South Africa and Others v M&G Media Ltd*,¹⁸¹ the Constitutional Court held that the right of access to information has an effect on the

¹⁷⁸ *Brümmer* case, para 63 at 1095.

¹⁷⁹ *Brümmer* case, para 89 (e) at 1102.

¹⁸⁰ *Brümmer* case para 89(g) at 1102.

¹⁸¹ 2012 (2) BCLR 181(CC) (hereafter referred to as *President of RSA* case).

exercise of the right to vote, it enables citizens to make responsible political decisions and participate meaningfully in public life.¹⁸² In this case, the Court had to, amongst others, consider how the State discharges its burden under section 81(3) of the PAIA of establishing its refusal to grant access to a required record in its possession.¹⁸³ The Court explained that in terms of section 81(3) of the PAIA, the State has the evidentiary burden which must be discharged on a balance of probabilities. The Court went on to state that according to section 32 of the Constitution and the scheme of the PAIA, disclosure of information is the rule and exemptions from disclosure is the exception and any refusal must be reasonable.¹⁸⁴

Moreover, in the *President of RSA* case, the Court explained that the evidence placed by the State in their affidavits have to be sufficient to show that the information falls within the exemptions claimed and not just a mere recitation of the statutory language dealing with exemptions.¹⁸⁵ Cameron J, in his minority judgment, emphasised that:

The PAIA requires an information officer who refuses a request to state adequate reasons for the refusal, including the provisions of this Act relied upon. This means that a decision-maker must give adequate reasons in addition to stating the statute's provisions on which he or she relies.¹⁸⁶

The Court was also unequivocal in emphasising that the scheme of PAIA requires information to be disclosed unless it was exempted in terms of one or more narrowly-construed exemption.¹⁸⁷ Furthermore, the Court stated that there was no discretion to withhold information not protected.¹⁸⁸ Thus one thing is clear, the maximum disclosure of information in the hands of the State is the rule and non-disclosure is certainly the exception. In other words, the information in the hands of the State must be accessible to the general public without hindrances, subject to clear limited exemptions. This interpretation is without a doubt consistent with the expressed constitutional goal of establishing an open democratic society in South Africa.

Moreover, in the *President of RSA* case, the Court interrogated the role of section 80 of the PAIA. This provision enables the courts to call for contested records as

¹⁸² *President of RSA* case, para 10 at 186.

¹⁸³ *President of RSA* case, para 5 at 185.

¹⁸⁴ *President of RSA* case, para 22 at 190.

¹⁸⁵ *President of RSA* case, para 24 at 191.

¹⁸⁶ *President of RSA* case, para 83 at 205.

¹⁸⁷ *President of RSA* case, para 30 at 192.

¹⁸⁸ *President of RSA* case, para 65 at 201.

additional evidence to test the validity of any exemptions claimed by the State. According to the Court, this section of the PAIA serves as an extremely important tool that can be used by the courts to independently assess claims of exemption and thus protecting the constitutional right of access to information.¹⁸⁹ The Court rightly pointed out that the purpose of this provision was to enable the courts to execute their judicial function responsibly and to prevent them from being mere spectators.¹⁹⁰ It must be emphasised that section 80 of the PAIA is an important provision that empowers the courts to ensure that there is transparency and accountability in public and private bodies.

In the *Independent Newspaper* case, the Constitutional Court had to decide whether the right to open justice entitled Independent Newspapers to access restricted materials contained in the Court's records.¹⁹¹ Although this case did not deal directly with the right of access to information but the concept of open justice is related to access to information and the desire to foster the legal culture of accountability, responsiveness and openness in South Africa. As noted earlier, Moseneke D.C.J. who wrote for the majority, emphasised that the "systemic requirements of openness in our society flows from the very founding values of our Constitution, which enjoins our society to establish democratic government under the sway of constitutional supremacy and the rule of law in order, amongst other things, to ensure transparency, accountability and responsiveness in the way courts and all organs of state function".¹⁹² Moseneke D.C.J. further acknowledged that the media's right to gain access to observe and report on the administration of justice was intertwined with the right to open justice.¹⁹³

In a separate judgment in the *Independent Newspaper* case, Sachs J. acknowledged that open justice forms an integral part of an open democratic society.¹⁹⁴ Sachs J. went on to state that the theme of openness is underlined in the Preamble, the limitation clause, in the provision dealing with the interpretation of the Bill of Rights, and in sections on the manner in which Parliament and other legislative bodies

¹⁸⁹ *President of RSA* case, para 53 at 198.

¹⁹⁰ *President of RSA* case, para 50 at 197.

¹⁹¹ *Independent Newspaper* case, para 1 at 775.

¹⁹² *Independent Newspaper* case, para 40 at 787.

¹⁹³ *Independent Newspaper* case, para 41 at 787.

¹⁹⁴ *Independent Newspaper* case, para 151 at 821.

should function.¹⁹⁵ It stands to reason therefore, that the Constitution requires all arms of Government to adhere to the values of transparency, responsiveness and openness in their dealings with the public and no sphere of Government is exempt from such a requirement. However, the Court acknowledged that the right to open justice and the right to report can also be limited in instances where a right to a fair trial or the dignity of others were at stake.¹⁹⁶

The views expressed by the Constitutional Court in the *Independent Newspaper* case on open justice were confirmed by the Supreme Court of Appeal in a recent matter of *City of Cape Town v South African National Roads Authority Limited and Others*.¹⁹⁷ In this case, the Supreme Court affirmed the importance of the principle of openness in the South African constitutional order. The Court held that the PAIA and section 32 of the Constitution establishes a default position of openness with regard to accessibility of information held by the State.¹⁹⁸ The Court further acknowledged that the public rely on the right of access to information for the reporting on matters of public interest and to expose corruption on the part of the public officials.¹⁹⁹ In addition, the Court emphasised the importance of open justice in terms of building a society's trust in their Government.²⁰⁰ However, according to the Court the principle of open justice did not entail unrestricted reporting and the denial of good and genuine reasons for restrictions.²⁰¹ It was further affirmed that the right to open justice is connected to the constitutional goals of creating a legal culture of transparency, accountability and openness in South Africa.

4.3 Conclusion

In conclusion, the afore-mentioned case law illustrates the important developments in relation to the right of access to information in the new South African constitutional dispensation. There is no doubt that this body of jurisprudence developed since 1994, constitutes a significant foundation through which the constitutional goals of establishing an open democratic society are to be realised. Some academic

¹⁹⁵ *Independent Newspaper* case, para 153 at 822.

¹⁹⁶ *Independent Newspaper* case, para 44 at 788.

¹⁹⁷ 2015 (3) 386 (SCA) (hereafter referred to as *SANRAL* case).

¹⁹⁸ *SANRAL* case, para 38 at 417.

¹⁹⁹ *SANRAL* case, para 20 at 403.

²⁰⁰ *SANRAL* case, para 22 at 405.

²⁰¹ *SANRAL* case, para 46 at 422.

commentators argue that access to information should be viewed as an instrumental and basic human right because any successful implementation and protection of civil, political, cultural, economic and social rights depends on the right of access to information.²⁰² The various cases evaluated in this thesis indicates that the right of access to information is one of the most crucial rights that safeguards South Africa's nascent constitutional democracy.

Moreover, the right of access to information jurisprudence indicates that the South African courts, particularly the Constitutional Court are steadfast in fulfilling their constitutional responsibility entrusted to them in terms of section 165 (2) of the Constitution.²⁰³ In addition, it is clear that the courts have interpreted the right of access to information in a manner that promotes and safeguards the values of democracy and openness in the new South African constitutional democracy.²⁰⁴ The following chapter deals with the summary and conclusion.

²⁰² J Britz & P Lor , *The right to be information literate: the core foundation of the knowledge society* (2010), page 17 [http://repository.up.ac.za/bitstream/handle/2263/16528/Britz_Right_\(2010\).pdf](http://repository.up.ac.za/bitstream/handle/2263/16528/Britz_Right_(2010).pdf) (accessed: 04/06/2015).

²⁰³ In terms of s165 (2) of the Constitution, the courts are required to be independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

²⁰⁴ S39 (1) (a) of the Constitution.

Chapter 5: Final Comments and Conclusion

5.1 Introduction

As stated previously, the Preamble of the Constitution expressly enjoins all South Africans not only to heal the divisions created during the apartheid era but also to create, amongst other things, an open democratic society in which government is based on the will of the people. The importance of openness in the new South African constitutional dispensation was well captured in the matter of *Matatiele Municipality v the President of the Republic of South Africa and Others*.²⁰⁵ In this case, the Court held that openness promotes both the rationality that the rule of law requires, and the accountability that a multi-party democracy demands.²⁰⁶ It has already been explained, that the rule of law as set out in section 1 of the Constitution is one of the foundational values upon which the South African nascent constitutional democratic state is founded.

The case law, particularly the Constitutional Court judgments evaluated in this thesis clearly indicates the steadfastness with which the right of access to information and the constitutional values underpinning the South African constitutional democracy have been upheld. Indeed, the crucial role played by South African courts and its contribution in shaping an open democratic South Africa cannot be gainsaid. The right of access to information jurisprudence produced by the Constitutional Court serves as a source of pride and an indication that this Court is independent and only subject to the Constitution and the law.

5.2 Final Comments

The various cases evaluated in this thesis demonstrates that there is a direct link between the right of access to information and the founding values of accountability, responsiveness and openness in South Africa. This point was highlighted by the Constitutional Court in the *President of the RSA* case. The Court expressed that the constitutional guarantee of the right of access to information held by the State gives

²⁰⁵ 2006 (5) BCLR 622 (CC) (hereafter referred to as *Matatiele 1* case).

²⁰⁶ *Matatiele 1* case, para 110 at 656.

effect to accountability, responsiveness and openness, which are founding values of the South African constitutional democracy.²⁰⁷

Moreover, in light of the above-mentioned case law, it has been demonstrated that the right of access to information has developed into an essential tool that enables the media to fulfil its constitutional obligation as provided for in section 16 of the Constitution. Section 16 of the Constitution guarantees the right to freedom of expression, which includes the freedom of the press and other media. The Constitutional Court has emphasised the crucial role that the media plays in the new South African dispensation.²⁰⁸ It has been illustrated that the media plays a vital role in safeguarding the South African democracy, particularly in exposing corruption, maladministration and transgressions of the Constitution. It is important in this context to highlight one such example whereby the Mail & Guardian newspaper carried an exposé detailing the allegations of impropriety and irregular expenditure relating to the installation of security measures at President Zuma's private residence in Nkandla.²⁰⁹ As a result thereof, the office of the Public Protector conducted an investigation to this matter and found evidence of impropriety and irregular expenditure.²¹⁰ It stands to reason therefore that without the right of access to information, the values of openness and accountability will be undermined and the culture of corruption and impunity will prevail in public and private institutions.

The Constitutional Court in the *SABC* case, stated that the ability of each citizen to be a responsible and effective member of society is closely related to the manner in which the media carries out their constitutional mandate.²¹¹ There is no doubt therefore that the free flow of information is crucial in a democratic state such as South Africa, it ensures that citizens are informed about matters affecting their constitutional rights. In addition, in the matter of *Democratic Alliance v African National Congress and Another*,²¹² Cameron J, observed that:

The Constitution recognises that people in our society must be able to hear, form and express opinions freely. For freedom of expression is the cornerstone of democracy.

²⁰⁷ *President of RSA* case, para 10 at 186.

²⁰⁸ *Brümmer* case, para 63 at 1096.

²⁰⁹ See www.enca.com/south-africa/zuma-and-journalist-who-first-uncovered-nkandla (accessed: 08/09/2015).

²¹⁰ See www.publicprotector.org/library/investigationreport2013-1 *Secure in Comfort Report* (accessed: 18/12/2015).

²¹¹ *SABC* case, para 24 at 177.

²¹² 2015 (3) BCLR 928 (CC) (hereafter referred to as *Nkandla SMS* case).

It is valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed. It also helps the search for truth by both individuals and society generally. If society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values.²¹³

It stands to reason that the right of access to information is a valuable tool utilised by the media in carrying out its constitutional mandate and thus contributing to the development and the durability of the South African constitutional democracy.²¹⁴

The importance of the right of access to information in South African society is further bolstered by the Constitution which envisages a democracy that is representative, and that contains elements of participatory democracy.²¹⁵ The importance of public participation in the South African constitutional democracy was explained in the case of *Doctors for Life International v the Speaker of the National Assembly and Others*.²¹⁶ In this case, the Constitutional Court explained that public participation provides strength to the functioning of representative democracy and encourages citizens to be actively involved in public affairs, identifying themselves with institutions of Government and becoming familiar with the laws as they are made.²¹⁷ In addition, the importance of public participation in the South African society has to be viewed in light of what the Preamble of the Constitution demands, a democratic country based on the will of the people. Furthermore, the importance of public participation has to be viewed in light of the declared objects of the PAIA which, *inter alia*, encourages the public to effectively scrutinise, and participate in matters of public significance and in decisions that affect their rights.²¹⁸ The vigorous right of access to information jurisprudence developed since 1994 seem to be in line with the notion of public participation that the Constitution and the PAIA envisages.

Another important development that has been ventilated by the Constitutional Court in various judgments is the effect that the right of access to information has on the exercise of the right to vote.²¹⁹ The Constitutional Court has emphasised that the lack of information undermines the ability of citizens to make responsible political

²¹³ *Nkandla SMS case*, para 122 at 333.

²¹⁴ *Holomisa case*, para 24 at 782.

²¹⁵ See *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007(1) BCLR 47 (CC), para 40 at 61 (hereafter referred to as *Matatiele 2*).

²¹⁶ 2006 (12) BCLR 1399 (CC) (hereafter referred to a *Doctors for Life case*).

²¹⁷ *Doctors for Life case*, para B-C at 1442.

²¹⁸ S9 (e) (iii) of the PAIA.

²¹⁹ See for example *President of the RSA case*, para 10 at 186.

decisions and participate meaningfully in matters of public interest.²²⁰ The right to vote has been identified as foundational in the South African democracy, which is also a core value entrenched in section 1 of the Constitution.²²¹ It is therefore, submitted that in a constitutional democracy such as South Africa, where the values of accountability, responsiveness and openness are foundational, it is critical that the right of access to information is upheld in order to empower citizens to vote for a Government that is transparent, accountable and responsive to their needs. The importance of providing the general public with access to public information that impact on their lives cannot be overemphasised. It is part of an open democratic society envisioned by the Constitution.

It is in addition necessary to consider what Cameron J. stated in the *My Vote Counts* case. Cameron J. stated that the right to vote is not only about making a cross on a ballot paper but voting knowing what the political party of your choice represents and what its contribution to the constitutional democracy and the achievement of the constitutional goals will be.²²² This study clearly indicates that the South African courts, particularly the Constitutional Court, have developed the right of access to information into an essential tool that safeguards the current South African constitutional order and the attainment of the expressed constitutional goals of establishing an open democracy South Africa.

It is important in this context to note the role given to the Human Rights Commission in assisting members of the public to assert their constitutional right of access to information.²²³ This important role further illuminates the importance of the right of access to information in the South African democracy. The PAIA provides in section 83, 84 and 85 for the role of the Commission in advancing the right to access to information and monitoring the implementation of the PAIA. In the *Brümmer* case, the Constitutional Court noted that the Commission is an important constitutional

²²⁰ *President of the RSA* case, para 10 at 186.

²²¹ *Nicro* case, para 47 at 297.

²²² *My Vote Counts* case, para 41 at 22.

²²³ See, Human Right Commission 2013/2014 the Commission PAIA Annual Report <http://www.humanrightsinitiative.org/publications> (accessed: 27/06/2014) (the Report is hereafter referred to as Commission PAIA Annual Report (2013/14)).

body tasked to advance and protect human rights, including the right of access to information in South Africa.²²⁴

According to the 2013/2014 PAIA Annual Report, the Commission stated that there were indications through complaints received within the reporting period that the levels of awareness and usage of the right of access to information and the PAIA were increasing.²²⁵ However, the public bodies were uncooperative and reluctant to release information within the prescribed timeframes.²²⁶ Another concern raised in the report was that the right of access to information could only be realised by those who could afford to litigate after a request for information has been refused. This concern was compounded by the fact that the PAIA matters could only be heard by the high courts. The report went on to state that, in terms of *Government Notice No. R965, Government Gazette No. 32622* the PAIA matters can now be heard by magistrate courts. There is no doubt that this development is a step in the right direction and it has been welcomed by the Commission. The report further noted that the failure of the PAIA to penalise non-compliance with section 32 combined with the limited enforcement powers of the Commission has contributed to public bodies disregarding their section 32 obligations.²²⁷ It is hoped that the Parliament of the Republic of South Africa will, within its oversight mandate to the Executive, attempt to remedy all the concerns raised in the Commission's 2013/2014 PAIA report.

5.3 Conclusion

In conclusion, it is perhaps proper to answer the question whether the case law evaluated in this thesis has made the necessary contribution towards achieving the objective of establishing an open democracy in South Africa. It is safe to conclude that the case law evaluated underscores the robustness with which the South African courts, particularly the Constitutional Court have asserted the importance of the right of access to information in South Africa's new constitutional legal order. In doing so, the courts have developed a progressive right of access to information jurisprudence that exemplifies an extraordinary commitment to discharge their role of interpreting the Bill of Rights in a manner that upholds the values underlying an open democratic

²²⁴ *Brümmer* case, para 25 at 1084.

²²⁵ Commission PAIA Annual Report (2013/14), at page 17.

²²⁶ Commission PAIA Annual Report (2013/14), at page 17.

²²⁷ Commission PAIA Annual Report (2013/14), at page 31.

society.²²⁸ There is, however, a need as suggested by the 2013/2014 PAIA Annual Report of the Human Rights Commission to do more in promoting awareness amongst ordinary people about the existence and the importance of the right of access to information in South Africa's new constitutional legal order.

To this end, it is submitted that the right of access to information has developed into a valuable tool that gives all South Africans a voice and the opportunity to make a significant difference in safeguarding the South African constitutional legal order. This study confirms that the right of access to information jurisprudence developed since 1994 remains a beacon that will guide the political, moral and economic transformation that this country needs as it enters its third decade of constitutional democracy.

²²⁸ S39 (1) (a) of the Constitution.

BIBLIOGRAPHY

BOOKS	Mode of Citation
Bekink B, <i>Principles of South African Constitutional Law</i> (LexisNexis 2012)	Bekink (2012)
Currie I & De Waal J, <i>The Bill of Rights Handbook: Sixth Edition</i> (Juta 2013)	Currie and De Waal (2013)
Dugard J, <i>Human Rights and the South African Legal Order</i> (Princeton University Press 1978)	Dugard (1978)
Hoexter C, <i>Administrative Law in South Africa</i> Second Edition (Juta 2012)	Hoexster (2012)
Rautenbach IM and Malherbe EFJ, <i>Constitutional law</i> (Sixth Edition) (LexisNexis 2012)	Rautenbach and Malherbe (2012)
Woolman, Roux, Klaaren, Stein, Chaskalson (eds) <i>Constitutional Law of South Africa</i> Second Edition (Juta 2005)	
Woolman S and Bishop M (eds), <i>Constitutional Law of South Africa</i> Second Edition Volume 4 Cape Town: Juta & Co Ltd (2013)	Woolman and Bishop (2013)

Articles	Mode of Citation
Britz Johannes and Lor Peter (2010) <i>The right to the information literate: the core foundation of the knowledge society</i> (Innovation No.41 December 2010)	
Moseneke Dikgang (2012) <i>A journey from the heart of apartheid darkness towards a just society: Salient features of the budding constitutionalism and jurisprudence of South Africa</i> (available at http://scholarship.law.georgetown.edu/hartlecture/1/)	



Reports	Mode of Citation
Article 19 World Report 1988 <i>Information, Freedom and Censorship</i> (Longman Group UK Limited) 1988	Article 19 World Report (1988)
The South African Human Rights Commission <i>The Promotion of Access to Information Act Annual Report 2013-2014</i>	Commission PAIA Annual Report (2013/14)

Legislation	Mode of Citation
<i>Constitution of the Republic of South Africa</i> , 1993	The Interim Constitution
<i>Constitution of the Republic of South Africa</i> , 1996	Constitution
<i>Promotion of Access to Information Act</i> , (Act 2 of 2000)	The PAIA
<i>Protection of Information Act</i> 84 of 1982	

Cases	Mode of Citation
<i>Brümmer v Minister for Social Development and others</i> , 2009 (11) BCLR 1075 (CC)	<i>Brümmer case</i>
<i>Certification of the Constitution of the Republic of South Africa</i> , 1996 (10) BCLR 1253 (CC)	<i>First Certification Judgment</i>
<i>Certification of the Amended Text of the Constitution of the Republic of South Africa</i> , 1996 1997 (1) BCLR 1 (CC)	<i>Second Certification Judgment</i>
<i>City of Cape Town v South African National Roads Authority Limited and Others</i> 2015 (3) 386 (SCA)	SANRAL case



<i>Democratic Alliance v African National Congress and Another</i> 2015 (3) BCLR 928 (CC)	<i>Nkandla SMS case</i>
<i>Directory Advertising Cost Cutters CC v Minister for Posts, Telecommunications and Broadcasting and Others</i> (1996) 2 all SA 83 (T)	<i>Directory Advertising case</i>
<i>Doctors for Life International v Speaker of the National Assembly and Others</i> 2006 (12) BCLR 1399 (CC)	<i>Doctors for Life case</i>
<i>Glenister v President of the Republic of South Africa and Others</i> 2011 (7) BCLR 651 (CC)	<i>Glenister case</i>
<i>Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa and Another</i> 2008 (8) BCLR 771 (CC)	<i>Independent Newspapers case</i>
<i>Ingledeu v the Financial Services Board and Others</i> 2003 (8) BCLR 825 (CC)	<i>Ingledeu case</i>
<i>Institute for Democracy in South Africa AND Others v African National Congress and Others</i> 2005 (5) SA 39 (C)	<i>IDASA case</i>
<i>Khala v Minister of Safety and Security</i> 1994 (4) SA 218	<i>Khala case</i>
<i>Khumalo and others v Holomisa</i> 2002 (8) BCLR 771	<i>Holomisa case</i>
<i>Matatiele v President of the Republic of South Africa and Others</i> 2006 (5) BCLR 622 (CC)	<i>Matatiele 1 case</i>
<i>Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others</i> , 2005 (3) SA 280 (CC)	<i>NICRO case</i>
<i>M&G Media Ltd AND Others v FIFA World Cup Organising Committee South Africa Ltd and Another</i> 2011 (5) SA 163 (GSJ) A	



<i>My Vote Counts NPC v Speaker of the National Assembly and Others</i> 2015 ZACC 31 (available at http://www.saflii.org.za)	<i>My Vote Counts case</i>
<i>NISEC (Edms) Bpk v Western Cape Provincial Tender Board and Others</i> 1997 (3) BCLR 367 (C)	<i>NISEC case</i>
<i>Nortje and Another v Attorney-General of the Cape and Another</i> 1995 (2) BCLR 236 (C)	<i>Nortje case</i>
<i>PHP Billiton PLC INC AND Others v De Lange and Others</i> 2013 (3) SA 571 (SCA) A	<i>PHP Billiton case</i>
<i>PFE International Inc (BVI) v Industrial Development Corporation of South Africa Ltd</i> 2013 (1) SA 1 (CC)	<i>PFE International case</i>
<i>Phato v Attorney-General, Eastern Cape, and Another</i> 1995 (1) SA 799	<i>Phato case</i>
<i>President of the Republic of South Africa and Others v M & G Media Ltd</i> 2012 (2) BCLR 181 (CC)	<i>President of RSA case</i>
<i>Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (PTY) LTD and Others</i> 2013 (3) SA 315 (SCA) A	<i>Qoboshiyane case</i>
<i>Qozeleni v Minister of Law and Order and Another</i> 1994 (3) SA 625	<i>Qozeleni case</i>
<i>R v steyn</i> 1954 (1) SA 324	<i>R v steyn</i>
<i>Sachs v Minister of Justice; Diamond v Minister of Justice</i> 1934 Appellate Division 11	<i>Diamond case</i>
<i>S v Makwanyane and another</i> 1995 (6) BCLR 665 (CC)	<i>Makwanyane case</i>
<i>S v Basson</i> 2007 (3) SA 582	
<i>Shabalala v The Attorney General of the Transvaal and Others</i> 1995 (12) BCLR 1593 (CC)	<i>Shabalala case</i>



<i>South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others</i> 2007 (2) BCLR 167 (CC)	SABC case
<i>South African Police Service v Solidarity obo Barnard</i> 2014 (10) BCLR 1195 (CC)	Solidarity case
<i>United Democratic Movement v President of the Republic of South Africa and Others</i> 2002 (11) BCLR 1179 (CC)	
<i>Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)</i> 2008 (2) SA 472 (CC)	
<i>Matatiele Municipality and Others v President of the Republic of South Africa and Others</i> 2007(1) BCLR 47 (CC)	Matatiele 2 case

Internet Sources	Date Viewed
www.sahistory.org.za	16 May 2014
www.constitutionalcourt.org.za	24 June 2014
www.dfa.gov.za/docs/speeches/mbeki.htm	27 June 2014
www.humanrightsinitiative.org/publications	27 June 2014
www.nelsonmandela.org	8 July 2015
www.sahistory.org.za/topic/state-emergency	14 February 2014



www.enca.com/south-africa/zuma-and-journalist-who-firstuncovered-nkandla	08 September 2015
http://scholarship.law.georgetown.edu/hartlecture/1	15 May 2015
www.saflii.org.za	2 October 2015
www.ssa.gov.za	2 August 2014